

IN THE SUPREME COURT OF THE STATE OF IDAHO

NATHAN BYERLY,)
) No. 46642-2019
 Petitioner-Appellant,)
) Ada County Case No.
 v.) CV01-18-10455
)
 STATE OF IDAHO,)
)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

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STATEMENT OF THE CASE

Nature Of The Case

Nathan Byerly appeals from the summary dismissal of his petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

In December of 2005, Nathan Byerly was convicted of aggravated assault and aggravated battery.¹ (R., pp. 5, 278-79.) He filed a petition for post-conviction relief on June 6, 2018 (R., pp. 5-57), alleging thirty-seven bases for post-conviction relief, all addressed to his trial and convictions in 2005 (R., pp. 20-53). As relief, he requested a reversal of his convictions and a new trial, along with other relief associated with the conduct of the new trial. (R., pp. 54-56.)

He alleged that he was incarcerated between 2006 and 2013, when he was granted parole. (R., p. 6.) He alleged that he filed an appeal in 2010 while incarcerated but the appeal was dismissed. (R., pp. 7-8.) He claimed that he was released on parole in October of 2013 and he began the process of seeking relief with respect to the claims in his petition but “was restricted before being able to do what was necessary to re-enter court on the issues.” (R., p. 8.) He alleged that, in March of 2015, he “sought sacred sanctuary upon declaration of Jubilee year by the Pope over one hundred miles beyond STATE OF IDAHO jurisdiction, sojourning at STATE OF UTAH until Petitioner could afford to return to territory of Residency.” (Id.) What Byerly considered “sacred sanctuary,” the state considered a parole violation. He alleged that he was

¹ Little of the record from the underlying criminal case is in the record in the post-conviction proceedings. However, there is no dispute regarding the relevant dates forming the basis of the district court’s determination that Byerly’s petition is untimely. Byerly cites the dates himself in filings below and his opening brief on appeal.

arrested in Utah and was incarcerated there until March of 2016, at which point he was paroled and re-arrested on an Idaho warrant associated with his parole violation. (R., pp. 8-9.) He was extradited to Idaho in early June of 2016. (R., p. 9.) On return, he alleges that his parole was revoked.² (R., pp. 10-11.)

After Byerly filed his petition, the state moved for summary dismissal. (Supp. R., pp. 485-86.) In support, the state submitted records associated with Byerly's prior appeal. (Supp. R., pp. 487-92.) Those records reflect that, in June of 2008, Byerly moved the district court to unseal his PSI under I.C.R. 32, purportedly to assist him in preparing a motion under I.C.R. 35. (Supp. R., pp. 487-89.) Because a motion under I.C.R. 35(b) would have been untimely and such a motion would therefore provide no reason to unseal the PSI, the district court provided Byerly time to clarify the basis of his motion. (Id.) Byerly responded and "abandoned his request for release of the PSI to help him prepare a Rule 35 motion" and instead "ask[ed] for the PSI because he claim[ed] information contained therein has affected his custody status at the correctional facility." (Supp. R., p. 488.) The district court denied that motion. (Supp. R., pp. 488-89.) In April of 2009, Byerly then appealed the district court's denial of his request to unseal his PSI.³ (Supp. R., pp. 490-91.) Finally, on Byerly's motion, the appeal was dismissed by the Idaho Supreme Court and a remittitur issued on April 12, 2010. (Supp. R., p. 492.)

In support of the motion to dismiss the petition, the state argued that the time for Byerly to file a post-conviction petition had long since expired, even on the counterfactual assumption

² He also claims that he was charged and convicted of other criminal conduct, which conviction is the subject of a separate challenge in state and federal courts. (R., pp. 10-11.)

³ After filing a notice of appeal, Byerly filed a motion for a permissive, interlocutory appeal under Idaho Appellate Rule 12. (Supp. R., pp. 490-91.) The district court denied that motion because the order denying his request to unseal the PSI was not an interlocutory order. (Id.)

that the petition was somehow addressed to his motion to release the PSI and the appeal from the denial of that motion. (Supp. R., p. 497.) The state further argued that none of the very limited bases for equitable tolling of the time to file a petition applied here. (Supp. R., pp. 497-99.)

Byerly responded, arguing that his petition should be considered timely under equitable tolling. (R., p. 143.) He cited a variety of factors that, he claims, should toll the deadline to file his petition, including: (1) the district court's refusal to unseal his PSI (Supp. R., pp. 502-03); (2) alleged ineffective assistance of his Idaho Appellate Public Defender in the appeal from the denial of his request that his PSI be unsealed (*id.*); (3) alleged and unspecified "retaliations" while incarcerated (Supp. R., p. 504); (4) parole restrictions after he was paroled in October of 2013 that "chill[ed]" his ability to file a petition (Supp. R., p. 504); (5) general concerns about the (in)effectiveness of "Idaho's public defender system" (Supp. R., pp. 504-05); (6) a "lack of available legal resources, materials, counsel" (Supp. R., p. 506); (7) "out of state incarceration periods" (*id.*); (8) "interference with access to courts of prison and retaliation" (*id.*); and (9) "Golden Jubilee and extraordinaire [*sic*] rendition" (*id.*).

Though it is not entirely clear, it appears that Byerly believed that, because of his appeal of the denial of his motion to unseal his PSI, his deadline to file a petition would not have begun until a year after he was released on parole, or in October of 2014. (Supp. R., 507.) But, he claimed, that deadline was tolled because he was "chill[ed]" from filing a petition by his parole conditions. (*Id.*) This, he claimed "again advances the date into 2015 when Mr. Byerly is out of state and incarcerated in Utah." (*Id.*) He claimed that after he had "taken Jubilee refuge in sanctuary in Utah," was arrested and then released from prison in Utah in 2016, and then re-arrested on an Idaho warrant and returned to Idaho "about June 09, 2016, this advances the filing date to June 2017." (Supp. R., p. 508.) Finally, back in Idaho, he is tried on new felony charges

that are not resolved until May 24, 2017, which “advances the filing deadline to about May 24, 2018.” (Id.) So, Byerly claimed, his petition should be considered timely.

Byerly later filed various addenda to his petition and opposition to summary dismissal. (R., pp. 144-49, 150-237, 238-57.) In his addenda to his petition, he purported to assert additional claims for post-conviction relief, including a request for forensic testing of certain evidence (R., pp. 144-49) and an allegation that the state failed to comply with the Interstate Agreement on Detainers while he was incarcerated in Utah (R., pp. 150-237). In his addendum to his opposition to summary dismissal, he reiterated many of his claims regarding the alleged impropriety of summary dismissal. (R., pp. 238-57.) For the first time, though, he alleged that he was forcibly medicated for a period, apparently between 2006 and 2008, while incarcerated in Idaho. (R., p. 247.) He also filed a “Motion to Enjoin Party As Respondent,” demanding that the prosecutor withdraw from the case and issue a public apology because she stated that he was “out of custody” while on parole, rather than on “community custody,” as Byerly stated in his petition. (R., pp. 258-61.) Finally, though it does not appear in the record, he filed a “Motion for Appointment of Counsel for Hearing Only and Needs of Petitioner and Petitioner’s Scheduled Hearing Judicial Notice to Confer” (R., pp. 262-64), which “requests appointment of a public defender for this hearing only since he cannot hear due to tinnitus disabilities and ADHA [sic] and because he does not speak American Sign Language.” (R., p. 263.)

The district court denied Byerly’s request for an attorney. (Id.) The court noted that Byerly did not want an attorney for purposes of representing him in the post-conviction proceedings generally, but only to accommodate certain hearing difficulties. (Id.) The court declined to appoint an attorney for that purpose alone, instead offering Byerly various accommodations for any hearing issues, including, at no cost to Byerly, “a second court reporter

present to provide a real time reporting of the hearing for Petitioner to read on a laptop during the hearing,” as well as “a hearing device to enhance Petitioner’s ability to hear the proceedings.” (Id.) In an objection to the court’s denial of his motion, Byerly stated that he needed an attorney for the hearing because he was “illiterate,” but then also stated that he would use the real-time transcript the court had offered to provide and then relay statements to his court-appointed attorney, who could then relay them to the court. (R., pp. 266-69.) He also stated that he would personally address the court only in writing. (Id.) The district court later reiterated that it was denying the request because Byerly was not requesting legal counsel, but was simply asking for someone to “act as a mouthpiece and speak for him.” (R., p. 284.) In addition, the court denied the request because his post-conviction claims are “clearly barred by the statute of limitations” and so patently frivolous. (Id.)

Next, the court denied Byerly’s “Motion to Enjoin Party As Respondent.” (R., pp. 290-93.) Byerly cited Federal Rule of Civil Procedure 20 as a basis for the motion. (R., p. 290.) The district court concluded that the federal rule had no application to the proceeding, and Idaho Rule of Civil Procedure 20, while applicable to the proceeding, did not provide a basis for the relief requested by Byerly. (R., pp. 290-91.) That rule permits the joinder of a third-party as a defendant under circumstances the court determined were not present here. (Id.) In addition, though, the court determined that the prosecutor had not done anything improper in suggesting that Byerly was not “in custody” when he was on parole. (R., pp. 291-93.)

Finally, the court summarily dismissed Byerly’s petition as time-barred. It held that, taking Byerly’s claims about having been forcibly medicated until around 2008 at face value, the deadline was tolled until then. (R., pp. 286-87.) It held that the time to file a petition was further tolled by his appeal following his motion to unseal his PSI until a year after the remittitur from

that appeal was filed, or April 12, 2011. (Id.) But, the court held, the time was not tolled any further. In particular, the court rejected his arguments that he did not know post-conviction relief was available or had difficulty securing effective assistance of counsel, as well as his argument that the time for filing a post-conviction petition should be tolled because he decided to abscond from parole and was later arrested in Utah. (R., pp. 287-90.) The court therefore dismissed the petition as untimely. (R., pp. 294-95.)

The district court entered judgment (R., pp. 298-99) and Byerly timely filed a notice of appeal (R., pp. 300-06, 452-76).

ISSUES

Byerly states the issues on appeal as:

(1) The Objections and records filed in Case No. CV01-18-10455 by Petitioner identify the cross-mistakes-negligence and issues for redress of harm caused by the Ada County district court in conduct of that Cases; the issues, and the Relief requested in Case No. CRFE 2004-1058;

(2) The threshold issue on appeal i am raising is that the Ada County Court erred to Summarily Dismiss the Petition for Post Conviction Relief in Case No. CV01-18-10455; the court failed to account for proceedings ongoing in the Case No. CRFE 2004-1058 initiated by State of Idaho and that qualified under the law and factors that circumstances effecting time of filing of Petition;

(3) the conduct of Ada County Court was prejudicial toward the Appellant, in favor of State of Idaho, and contrary to the facts, disputed and presented at law in the Petition to the court by the Appellant for Remedy by the court, violating US Law-Rule-Treaty and Constitutions and Human Rights; Appellant has since been force to sue Ada County and Ada County Court for more prejudicial conduct against Appellant; Appellant has moved the Ada County Court must be disqualified and or the court must be transferred to another county of the District for taking up of the Petition For Post Conviction Relief that was filed in Ada County as Case No. CV01-18-10455; Idaho Supreme Court has authority to order transfer of proceedings as request;

(4) Ada County court err to Summary Dismiss Petition Case No. CV01-18-10455 and the case shall be transfer to another county and reinstate for conduct of process thereon;

(Appellant's brief, pp. 15-16 (verbatim).)

The state rephrases the issues as:

Has Byerly established that the district court erred in summarily dismissing his petition for post-conviction relief as untimely?

ARGUMENT

Byerly Has Failed To Show The District Court Erred By Summarily Dismissing His Petition For Post-Conviction Relief As Untimely

A. Introduction

The district court summarily dismissed Byerly's petition for post-conviction relief after recognizing that it purported to state claims related to his trial and conviction more than twelve years before the petition was filed and Byerly had not shown that equitable tolling applied to render the petition timely. (R., pp. 284-90, 293-95.) At the same time, it denied his request for a court-appointed attorney for purposes of a single hearing, not to represent him in the post-conviction proceeding generally, and only so that the attorney could relay to the court what Byerly told the attorney to relay. (R., pp. 262-65, 287-90.) Because the district court correctly determined that Byerly's post-conviction claims are clearly time-barred, it did not err by dismissing his petition and denying his request for counsel.

B. Standard Of Review

The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). "On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Byerly Waived Any Argument Regarding Error Below By Failing To Include Citations To The Record, Authority, And Coherent Argument In His Opening Brief

This court should decline to consider any claims of error on appeal because Byerly has failed to include any citations to the record or authority in his opening brief, as well as any coherent argument beyond conclusory claims of error. “When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.” State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). “A party waives an issue cited on appeal if either authority or argument is lacking, not just if both are lacking.” Id. It is well settled that the appellate court will not search the record for errors when an appellant fails to provide citations to the record. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983). That rule applies to pro se and represented appellants alike. State v. McDay, 164 Idaho 526, 528, 432 P.3d 643, 645 (2018) (“Because [pro se appellant’s] arguments lack citations to the record, citations of applicable authority, and comprehensible argument, this Court will not consider them on appeal.”).

Byerly’s opening brief on appeal consists entirely of factual allegations unsupported by any citations to the record and conclusory legal claims unsupported by any legal authority. Though Byerly does cite to the universe of law applicable in Idaho and the United States, and offers to “describe at length” how these general sources of law apply here “if the court requires it,” he makes no effort to do so in his brief. (Appellant’s brief, p. 16 (identifying as applicable law, e.g., the “United Nations Declaration of Human Rights,” “Federal Law-Rules-Treaties of the United States,” “State of Idaho law,” Title 19 of the Idaho Code, and the United States and Idaho constitutions).) Because he fails to support his claims of error with citations to the record, legal

authority, or coherent argument, this Court should decline to address Byerly's claims of error below.

D. Byerly's Post-Conviction Petition Is Untimely

Byerly's claims of error also fail on the merits. A petition for post-conviction relief must be filed within a year of the time to file a direct appeal or within one year of the resolution of such an appeal. I.C. § 19-4902(a). The only three circumstances in which Idaho recognizes equitable tolling of the post-conviction statute of limitations are: (1) "where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials," Sayas v. State, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct. App. 2003); (2) "where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction," Id.; and (3) where there are "claims which simply [were] not known to the defendant within the time limit, yet raise important due process issues," Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)).

Byerly's petition purports to state claims arising out of his trial and conviction in 2005. (R., pp. 5-57.) For example, he alleges that his attorney did not file a motion for judgment of acquittal (R., p. 20), there was error in the jury selection process (R., p. 21), and there was improper character evidence offered by the brother of Byerly's victim (R., p. 23).⁴ Having been convicted in 2005, Byerly filed his petition for post-conviction relief in 2018. As the district court correctly found, "it is clear that Petitioner's Petition for Post-Conviction Relief has not

⁴ Though the district court did not dismiss claims in Byerly's petition on this basis, many are (in addition to being time-barred) procedurally barred as claims that could and should have been pursued on direct appeal. I.C. § 19-4901(b).

been timely filed.” (R., p. 289.) It also correctly found that equitable tolling does not save it. (R., pp. 284-90, 294-95.) Though Byerly apparently disagrees with the latter conclusion, it is unclear why. In fact, the district court applied equitable tolling far more generously than was appropriate, even if the court correctly determined that Byerly’s petition was untimely.

The district court applied equitable tolling to find two periods of tolling. First, for the first time in an addendum to his opposition to summary dismissal, Byerly alleged that he was forcibly medicated for a period after he was incarcerated, apparently between 2006 and 2008. (R., p. 247.) The district court accepted Byerly’s claim regarding his incapacity during this period at face value and determined that the time to file a post-conviction claim did not begin to run until 2008 (R., pp. 284-86), when Byerly claims that he regained competency (R., p. 247). Second, the district court determined that Byerly’s appeal of the denial of his request to unseal his PSI further tolled the deadline to file a post-conviction claim until a year after the remittitur from that appeal issued, or April 12, 2011. (R., pp. 286-87.) But the court then concluded that no further tolling was appropriate. (R., pp. 286-90.)

As to the period of tolling associated with Byerly’s appeal, the district court erred in finding that tolling was appropriate. The time to file a post-conviction petition begins after the forty-two days to file a direct appeal from the conviction has passed, or until such an appeal is resolved. I.C. § 19-4902(a). Thus, a direct appeal from the judgment of conviction will delay the beginning of the period in which to file a post-conviction petition. But, it does not follow, and it is not true, that an appeal of a collateral, post-conviction order issued well after the time to file a direct appeal has passed tolls the time to file a petition related to the conviction and sentence. See Mills v. State, 126 Idaho 330, 333, 882 P.2d 985, 988 (Ct. App. 1994) (holding that where the “application for post-conviction relief was filed more than five years after expiration of the

period for appeal from the judgment of conviction, [petitioner] is time-barred from obtaining post-conviction relief on either the conviction or the imposition of sentence”); Peregrina v. State, 158 Idaho 948, 952, 354 P.3d 510, 514 (Ct. App. 2015) (“In other words, the time limit to file a petition for post-conviction relief regarding prejudgment matters is not renewed or extended by any other collateral post-judgment proceeding.”). A petitioner cannot perpetually keep the time to file post-conviction claims related to the conviction and sentence alive by filing a series of frivolous appeals from the denial of collateral post-trial motions. Byerly never filed a direct appeal. Instead, he filed an appeal from a collateral order long after the time to file a direct appeal passed. As a result, the deadline to file a petition for post-conviction relief related to his conviction and sentence ran by 2010 at the latest.

That error is ultimately inconsequential, however, as the district court correctly concluded that Byerly’s petition was still untimely. Even assuming the district court was correct that Byerly’s appeal somehow tolled the time to file a petition for post-conviction relief related to his judgment and sentence, the remittitur in that appeal issued on April 12, 2010. (Supp. R., p. 492.) So, as the district court found, the time to file the petition would still have run by April 12, 2011. (R., pp. 286-90.) See Peregrina, 158 Idaho at 951, 354 P.3d at 513 (“If a timely direct appeal is filed, the judgment becomes final and the one-year limitation period begins to run when the appeal is final, which occurs when the appellate court issues a remittitur.” (footnote omitted).) Byerly says nothing at all about the one-year period following April 12, 2010, when the remittitur issued. He claims, in a conclusory fashion, that he was denied adequate legal resources between 2008 and 2010 (Appellant’s brief, pp. 3-4), though that is also the period during which he filed a motion to release his PSI and an appeal from the denial of that motion (R., pp. 487-92). At any rate, again, even if tolling was appropriate through the end of 2010, he says nothing about the

period between 2011 and 2013. (Appellant’s brief, pp. 3-4.) Thus, the time to file his petition passed before he was paroled in October of 2013. (Id.)

Even if that were wrong, it would have passed after he was paroled. After he was paroled in October of 2013, Byerly claims that the actions of police and parole officers had a “chilling effect and disrupt petitioners [sic] access to courts and civil activities.” (Appellant’s brief, p. 4.) He cites no authority for the proposition that parole conditions, allegations of parole violations, and the receipt of traffic tickets, all of which Byerly complains about during this period (Appellant’s brief, pp. 4-5), could deprive him of access to the courts or toll the statute of limitations for filing of his petition. Next, Byerly apparently believes that the time to file for post-conviction relief was tolled by his decision to abscond on parole in 2015, leading to his arrest in Utah. (Appellant’s brief, p. 6.) As the district court correctly held, “[a]bsconding from supervision is not an ‘extraordinary circumstance’ tolling the statute of limitations.” (R., p. 289 (quoting Amboh v. State, 149 Idaho 650, 653, 239 P.3d 448, 451 (Ct. App. 2010) (“Idaho appellate courts have not permitted equitable tolling where the post-conviction petitioner’s own lack of diligence caused or contributed to the untimeliness of the petition.”))). According to Byerly, he was returned to Idaho in June of 2016. (R., p. 9; Appellant’s brief, p. 9.) Nevertheless, for reasons that he does not explain, his petition was not filed until June of 2018. Even assuming that the time to file his petition was somehow tolled until his return to Idaho, it ran before he filed his petition.

The time to file a petition for post-conviction relief challenging his convictions and sentence in 2005 had long passed by the time Byerly filed his petition, and none of the limited circumstances providing for equitable tolling applied to save it. The district court correctly dismissed the petition as untimely.

E. Byerly's Belated Attempt To State Claims That Were Not Time-Barred In Addenda To His Petition Does Not Suggest That The District Court Erred

After the state answered and moved for summary dismissal of Byerly's petition as time-barred, Byerly filed multiple addenda to his petition in an apparent attempt to state claims that were not. (R., pp. 144-49, 150-61.) In the first, he asked for "performance of fingerprint and forensic deoxyribonucleic acid (DNA) testing on evidence that was secured in relation to the trial which resulted in conviction in case No. 2004-1058." (R., pp. 144-45.) He claimed that the evidence was not "subject to the testing" at trial because his defense counsel "failed to so move." (Id.) The other addendum alleged that the state failed to act in accordance with the Interstate Agreement on Detainers (IAD), Title 19, Chapter 50 of the Idaho Code, when it sought his return to Idaho from Utah after his parole violation. (R., pp. 150-61.)

Byerly's belated attempt to state claims that were not time-barred fails. A petitioner cannot avoid summary dismissal of a petition by unilaterally, without leave of the court, filing an amended petition. I.C. § 19-4906(b); Cole v. State, 135 Idaho 107, 111, 15 P.3d 820, 824 (2000). The record does not reflect that Byerly secured leave to amend his petition after the state had already moved for summary dismissal, and after he had already opposed that motion. The claims were therefore not before the court.

But, even if they are considered part of the petition, both claims were still properly dismissed.

First, I.C. § 19-4902(b) provides that a petition for forensic testing of evidence may be brought at any time where the testing did not occur at trial because the relevant technology "was not available at the time of trial." "Thus, under the statute, post-conviction DNA testing is only available if the requested testing relies on technology that was not available at the time of the

original trial.” Johnson v. State, 162 Idaho 213, 218, 395 P.3d 1246, 1251 (2017). Byerly asserted that the testing he is requesting here was not done “because the attorney’s whom having been assigned to prepare the defense case of defendant petitioner failed to so move to have the testing performed at or before the time of trial,” not because some technology was not available. (R., pp. 144-45 (verbatim).) He is therefore not attempting to assert a claim permitted by I.C. § 19-4902(b), but instead is attempting to assert an ineffective assistance claim that is, like his other claims, barred by the statute of limitations.

Second, as to the claim alleging a violation of the IAD, based on Byerly’s own allegations, the IAD is simply irrelevant. Byerly claims that, while he was arrested in Utah, a detainer associated with his parole violation was lodged, but there were no pending charges in Idaho. (Appellant’s brief, pp. 6-7.) He complains that, though he tried to “timely resolve the detainer” by contacting the “State of Idaho Pardons and Parole and Executive Director Sandy Jones,” she did not respond. (Id.) The Interstate Agreement on Detainers provides, under certain circumstances, for the timely resolution of pending criminal charges against a defendant incarcerated out-of-state. I.C. § 19-5001(c)(1) (requiring trial within certain period of “untried indictment, information or complaint”). It does not apply to detainers associated with mere probation or parole violations. Swain v. State, 122 Idaho 918, 920, 841 P.2d 448, 450 (Ct. App. 1992). (“[T]he Interstate Agreement on Detainers Act does not apply to warrants or detainers asserting claims of alleged violation of probation.”). There is no viable, non-frivolous claim with respect to the IAD. If there were such a claim, it would concern criminal charges other than the 2005 convictions that Byerly is purporting to challenge here. In addition, any failure to comply with the IAD could and should have been pursued on direct appeal, for which post-conviction proceedings are not a substitute. I.C. § 19-4901(b).

The claims Byerly attempted to assert in his addenda were not properly before the district court and were properly dismissed even if they were.

F. The District Court Did Not Err By Refusing Byerly's Request For Appointed Counsel

A petitioner in a post-conviction proceeding may request appointment of counsel pursuant to Idaho Code § 19-4904. The decision to grant or deny a request for post-conviction court-appointed counsel is discretionary. Hust v. State, 147 Idaho 682, 683, 214 P.3d 668, 669 (Ct. App. 2009) (citing Charboneau, 140 Idaho at 792, 102 P.3d at 1111). “[C]ounsel should be appointed if the petitioner qualifies financially and alleges facts to raise the possibility of a valid claim.” Id. at 684, 214 P.3d at 670. A court may deny the request for counsel only if all the claims in the petition are frivolous. Id.

Byerly does not claim on appeal that the district court erred by denying his request for counsel. He has therefore waived any such claim. But even if he intended to assert it, he has failed to show that the district court erred by refusing to appoint counsel.

First, Byerly has not provided an adequate record to evaluate the claim on appeal. While he apparently filed a motion associated with the appointment of counsel, that motion is not in the record and so neither is the precise nature of the request that was denied by the district court. (R., pp. 262-65.) “Error will not be presumed on appeal, but must be affirmatively shown in the record. The appellant has the burden of providing an adequate record on appeal from which the Court can conduct an intelligent review of a trial court’s decision.” State v. Mowrey, 128 Idaho 804, 805, 919 P.2d 333, 334 (1996). This Court cannot determine that the district erred by denying a request that does not appear in the record.

Next, as characterized by the district court, Byerly did not request appointment of counsel for the post-conviction proceedings, but requested only that counsel be provided for a single hearing and only so that that person could relay statements to and from the court in order to compensate for his hearing problems. (R., pp. 262-63, 282-84.) The district court offered accommodations to help with any purported hearing problems (R., pp. 262-63), but concluded that it was not appropriate to appoint counsel for a single hearing, as opposed to the post-conviction proceedings generally, and only so that the attorney could “act as a mouthpiece and speak for [Byerly]” (R., pp. 283-84). Byerly has cited no authority for the proposition that it is an abuse of discretion for a district court to refuse to appoint an attorney where the request is not for legal advice and assistance in the proceedings, but only for an attorney to relay comments from the court to the petitioner during a single hearing and notwithstanding the availability of alternative means of compensating for petitioner’s hearing problems.

Finally, it is no abuse of discretion to deny a request for counsel where a petitioner’s claims are untimely and so frivolous, Hust, 147 Idaho at 686, 214 P.3d at 672, as are Byerly’s claims.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of the district court.

DATED this 9th day of January, 2020.

/s/ Andrew V. Wake
ANDREW V. WAKE
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 9th day of January, 2020, served a true and correct paper copy of the foregoing BRIEF OF RESPONDENT by placing the copy in the United States mail, postage prepaid, addressed to:

NATHAN BYERLY
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/s/ Andrew V. Wake
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Deputy Attorney General

AVW/dd